YIP KIM KHOON

v.

THE HONGKONG & SHANGHAI BANKING CORP.

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[IN BANKRUPTCY NO. D1-29-13725-89]
3 JUNE 1991

BANKRUPTCY: *Setting aside of bankruptcy notice and creditor's petition - Whether filed in Court of the state in which debtor carries on business - Non-disclosure in petition of assignment of property to creditor as security - Bankruptcy Act 1969, s. 5(2) - Bankruptcy Rules 1969, r. 101(1),(2) - Contracts Act 1950, s. 94.*

The judgment debtor opposed the creditor's petition dated 17 April 1990, which was filed in Kuala Lumpur, on the following grounds:

(a) the petition had contravened r. 101(1) and (2) of the Bankruptcy Rules 1969 (the Rules) as it was filed in the wrong Court - the debtor alleged that for the greater part of one year immediately preceding the petition, he had carried on business in the State of Johore; and

(b) the creditor had not disclosed in his petition that he was a secured creditor of certain property as required by s. 5(2) of the Bankruptcy Act 1969 (the Act) - the debtor contended that this property was assigned absolutely to the creditor in consideration of the creditor extending an overdraft facility to B Co. Sdn. Bhd. whereby the debtor agreed to be a guarantor.

Held:

[1] The provisions of r. 101(1) and (2) of the Rules are clear and unambiguous and the words "shall be filed" is mandatory - there is clear evidence, which has not been rebutted by the creditor, that since November 1988, which was well over one year immediately preceding the date of the petition, the debtor carried on his business in Johore. The petition, which should have been filed in the High Court in Johor Bahru, was set aside as it was bad in law.

[2] Under s. 94 of the Contracts Act 1950, the surety, who is the principal debtor in this case, is entitled to the benefit of the assigned property which the creditor has against B. Co. Sdn. Bhd.; the word debtor in s. 5(2) of the Act must be given a wider meaning then just the principal debtor and a surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor. Therefore, the creditor has violated s. 5(2) of the Act as it did not state in its petition that it was a secured creditor.

[Petition dismissed.]

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 5(2)
Bankruptcy Rule 1969, r. 101(1),(2)
Contracts Act 1950, s. 94

JUDGMENT

Shaik Daud Ismail J:

This is an application to set aside notice of bankruptcy and a creditor's petition by the judgment debtor. The bankruptcy emanated from a judgment obtained by the judgment creditor on 19 August 1987, whereby the judgment debtor was ordered to pay a sum of RM250,000 together with interest at the rate of 11.25% per annum from 22 April 1987 to the date of full payment and costs. The judgment creditor issued a bankruptcy notice dated 6 December 1989 for a total sum of RM324,212.60. Following this a creditor's petition dated 17 April 1990 was taken out.

In the notice of intention to oppose the petition the judgment debtor sets out two grounds. The first bone of contention by the judgment debtor is that the petition was filed at the wrong Court, contrary to r. 101(1),(2) of the Bankruptcy Rule 1969 which reads as follows:

> 101 (1) The petition shall be filed in the Court in which it is to be presented;
>
> (2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one state and resided in another state the petition shall be filed in the Court of the state in which he has carried on business.

In his notice to oppose the petition the debtor averred in paragraph two that for the greater part of one year immediately preceding the presentation of the petition he had carried on business in the State of Johore and had also resided for the greater part of the said year at Ampang in the State of Selangor. He further averred that he had carried on business at Suite 1007, 10th Floor, Merlin Tower, Jalan Meldrum, Johor Bahru.

In answer to these the creditor in his affidavit in reply (encl. 14) averred that the debtor had carried on business in Kuala Lumpur through his company of which he was a director called Bornion Company (KL) Sdn. Bhd., having its offices at No. 42-IJ, 1st Floor, City Towers, Jalan Alor, Kuala Lumpur and as such the petition was correctly and lawfully filed in Kuala Lumpur. In answer to this the debtor in his affidavit in reply (encl. 15) averred that he was a director of the said Bornion Company (KL) Sdn. Bhd. but in July 1987 the company had become defunct and ceased to carry on or conduct any business.

Learned counsel for the debtor argued that since the petition was dated 17 April 1990 and as the debtor had been carrying on business in Johor Bahru since November 1988 r. 101(2) clearly applies.

The provisions of r. 101(1) and (2) are very clear and unambiguous. The words "shall be filed" means what it says that is it is mandatory and must be filed in the particular state in which the debtor does his business for a greater part of one year preceding the petition. The creditor cannot, to my mind, chose or elect to file in the state more convenient to him. In this case there is clear evidence, which had not been rebutted by the creditor in his affidavit in reply, that the debtor, although he normally resided in Selangor, carried on his business in Johor Bahru since November 1988, well over one year immediately preceding the date of the petition. It is my finding that the proper place for the petition to be filed is the High Court in Johor Bahru and the creditor has wrongly filed this petition in Kuala Lumpur and as such on this point alone I hold that the petition is bad in law and ought to be set aside.

The second ground put forth by the debtor is that as the creditor is a secured creditor s. 5(2) of the Bankruptcy Act 1967 applies. Now s. 5(2) states:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

By the definition in s. 2 of the Bankruptcy Act 1967, a secured creditor means:

> a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

By a deed of assignment dated 14 April 1986 the entire rights and interests in and to the property identified as Lots 42-IJ and 42-IK 1st Floor, City Towers, Jalan Alor, Kuala Lumpur had been assigned to the creditor as security. This, contends the debtor, had not been disclosed and as such para. 3 of the petition is misleading. The security was assigned absolutely to the creditor in consideration of the creditor extending an overdraft facility of RM250,000 to the principal debtor, that is, Bornion Company Sdn. Bhd. and it was in consideration of that security that the debtor agreed to be a guarantor. This averment by the debtor (encl. 13) was never denied by the creditor. Since no mention of this security was made in the petition the creditor has therefore violated s. 5(2) of the Bankruptcy Act 1967.

Counsel for the creditor contends that since the property did not belong to the debtor in this petition but to a third party there is no need to mention this in the petition. He contends that in s. 5(2) of the Act it talks of property of debtor and this means the principal debtor. He cited s. 94 of the Contracts Act 1950. With respect this section does not help the creditor because it gives the surety (as the judgment debtor in this petition is) entitlement to the benefit of every security which the creditor has against the principal debtor. Thus in this petition the judgment debtor (Yip Kim Khoon) is entitled to the benefit of the security (the assigned property) which the creditor has against the principal debtor (Bornion Company (Kuala Lumpur) Sendirian Berhad). In any case I feel that the word debtor in s. 5(2) of the Act must be given wider meaning then just the principal debtor. A surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor.

Since the judgment creditor had violated ss. 5(2) of the Act and 101(2) of the Bankruptcy Rules I dismissed the petition.

Also found at [1991] 2 CLJ 1631